90-170

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM,1990

No. _____

ALFRED R. KUENNEN,Petitioner

vs.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

This cause presents the following questions of interest and importance which warrant and necessitate the attention of this Court ,to-wit:

A. Does Section 1461 of Title 18 of the United States Code apply to receivers of obscene literature as well as to senders of obscene literature under the provision in said section which includes as violators those who "knowingly causes to be delivered by mail according to the direction thereon *** or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof *** when as in the instant case the petitioners receipt is undisputedly for his own personal use.

2. When there is a sufficient

disparity of opinion among federal judges as to the classes of persons included as violators of a criminal statute, is this disparity sufficient to make the criminal statute sufficiently vague as to violate the provisions of Due Process of the United States Constitution, in its application in this case where it is applied to a receiver and there is a substantial difference of opinion as to whether receivers in general are included as violators under the statute.

3. Where obscene matter is received in the United States by the Customs branch of the United States from an overseas sender prior to its entry in the United States mail at Chicago, and then Customs in Chicago transports said material to customs in St Louis, and nine months later Customs personally

delivers the material to the post office box to which it is addressed, the post office box of the recipient, and the charge is "causes to be delivered by mail to *** ,the place at which it was directedto be delivered by defendant, to whom it was addressed,***" under the indictment herein and the povisions of Section 1461,Title 18,United States Code, then (a) the intervening act of customs was not a "controlled delivery",(b) the item was not delivered by mail but rather by customs, (c) the conduct of defendant at most constituted an attempt

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United States v. Ross,205 F.2d 619 (10th Cir. 1953)

United States v. Sidelko, 248 F.Supp.813 (MD Penn 1965)

State v. Block,62 SW 2d 428 (Mo Supp 1933)

Collins v Radford,113 SE 735 (Sup Ct of App Va 1922)

IN THE

SUPREME COURT OF THE UNITED STATES

ALFRED R. KUENNEN, Petitioner	)	
vs	)	No. _____
UNITED STATES OF AMERICA, Respondent	)	

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS EIGHTH CIRCUIT

TO: THE HONORABLE, THE CHIEF JUSTICE and ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

Alfred R. Kuennen, the petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals ,Eighth Circuit, entered in the above entitled cause on April 9,1990; Petitioner's

Motion For Rehearing and For Rehearing En Banc was denied on May 25,1990.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Eighth Circuit is cited as United States v. Alfred R. Kuennen,No. 89-1229, a copy of which is attached hereto as Exhibit A, in the appendix.

A copy of the Order Denying the Petition For Rehearing and Suggestion For Rehearing En Banc is attached hereto as Exhibit B, in the appendix.

JURISDICTION

The judgment of the United States Court of Appeals, Eighth Circuit , filed April 9,1990. The order denying a timely Motion for Rehearing was denied May 25,1990. The jurisdiction of this Court is envoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment I,

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution,Amendment V,

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy

of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or porperty, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1461 ,Title 18, United States Code.

Section 1461. Mailing obscene or crime-inciting matter

Every obscene, lewd, lascivious, indecent, filthy or vile article , matter, thing, device, or substance; and

Every article or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; and

Every article, instrument, substance, drug, medicine, or thing which is

advertised or described in a manner calculated to lead another to use or apply it for producing abortion, or for any indecent or immoral purpose; and

Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where ,or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means abortion may be produced, whether sealed or unsealed; and

Every paper, writing, advertisement, or representation that any article, instrument, substance, drug ,medicine, or

thing may, or can, be used or applied for producing abortion, or for any indecent or immoral purpose; and

Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance,drug,medicine or thing --

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowlingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section or section 3000(e) of title 39 to be nonmailable , or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or

knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisonment not more than ten years, or both, for each such offense thereafter.

The term "indecent", as used in this section includes matter fo a character tending to incite arson, murder, or assassination.

STATEMENT OF THE CASE

Petitioner was convicted of violating the provisions of Section 1461, Title 18, United States Code, in that he was found guilty of having knowingly

caused the delivery of obscene matter in the mails by causing the delivery thereof

The evidence of the government indicated that the Customs service intercepted a suspicious package from overseas prior to its entry into the United States mail; that upon opening the package they found obscene material; that they transported the package to St.Louis, Missouri; the package had been intercepted in Chicago; that the Customs service then placed the package or caused it to be placed in the post office box of the petitioner; when the petitioner picked up the package from his post office box he was arrested; that during a search of the petitioner's residence the customs agents found certified mail receipts addressed to the return address shown on the package; the customs agents

intercepted the package in Chicago on or about June 1984 and caused it to be placed in the post office box of the petitioner some 9 months later on or about March 1985.

REASONS FOR GRANTING THE WRIT

A. The United States Court of Appeals has decided an important question of federal law which has not been ,but should be, settled by this Court,for the reason that this is an era wherein obscenity has become an extremely significant issue; the nation is beset on a daily basis by charges in this area; the Congress has enacted Section 1461, of Title 18, USC, which in part prohibits the mailing of obscene literature, and in the course of its enactment Congress has indicated that the receivers of such materials are the "victims" which the

legislation is meant to protect, however, the decision of the Eighth Circuit Court of Appeals will now make the "victims" the criminals, and will now multiply the coverage which was intended to be senders of such material by millions if the "victims" are now included as criminals. Such an approach would not only thwart the purpose of congress but could result in an avalanche of cases being filed in the Federal Courts or an arbitrary selection process being used by the government prosecutors.

B. The United States Court of Appeals' interpretation of Section 1461, Title 18, United States Code , which includes recipients of obscene material as criminals as opposed to victims perpetuates the vagueness and ambiguity of the statute in regard to coverage as

demonstrated by the opinions in the Sidelko,supra, and the Johnson case being compared with the decision in this case in this era which involves many obscenity issues.

C. The United States Court of Appeals has decided an important question of federal law which has not been decided or settled by any other federal court nor by this court on the issue of causation in regarding the mailing provision of Section 1461, and in its decision the Court of Appeals inappropriately uses the Pereira , supra, decision of this court, as well as the Supreme Court of Missouri cases regarding the conduct indicated by the Court of Appeals as constituting at best an attempt and more likely an incomplete effort which was no crime.

D. The Petitioner, a victim in the

eyes of Congress, sits in prison being convicted of a crime which another Court of Appeals Judge has stated does not apply to Petitioner, and which the evidence clearly shows that the most he has done was to attempt to commit the offense even assuming he is in the class to be criminalized.

ARGUMENT

I. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUSTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT IN THAT IT HAS IN EFFECT DECIDED THAT RECIPIENTS (WHO ARE CONSIDERED AS VICTIMS BY CONGRESS) ARE INCLUDED AS CRIMINALS UNDER SECTION 1461.

This point is eloquently made in United States v. Johnson,855 F.2d 299(6th Cir. 1988) .Judge Merritt in his dissent clearly sets forth the basis for the belief that Section 1461 of Title 18,U.S.C, does not apply to recipients as well as to senders, of obscene

material.His analysis depends upon whether the statute is ambiguous and then whether the legislative history clarifies the ambiguity. At page 307 of the opinion he states the following,to-wit:

"The relevant language of Section 1461 provides:

Whoever knowingly uses the mails for the mailing,carriage in the mails, or delivery ***or knowingly causes to be delivered by mail according to the direction thereon***or knowingly takes any such thing from the mails for the purpose fo circulating or disposing thereof***.

"***the statute can be interpreted to apply only to senders of obscene material and not to receivers.It is the sender who literally `causes to be delivered by mail' material which he himself puts in the mail or causes another to put in the mail."

"The next significant phrase contained in the eiththh paragraph of section 1461 suggests that the `knowingly causes to be delivered'provision applies only to senders.The criminal act described in this paragraph is `or knowingly takes any such thing from the mails for the purpose of circulating***'This provision obviously applies to receivers of obscene material; but not all receivers, just those who intend to circulate the material.Since

this provision separately and explicitly deals with receivers, it is certainly arguable that the previous provisions deal only with senders."

"The words `according to the direction thereon'lead to the same conclusion because receivers' `directions' or requests, are not on the mailed material. If receivers are contemplated by this provision then these five words are meaningless. `By making the words `according to direction thereon' apply to senders only, we can make some sense of the language.***".

At page 308,Judge Merritt then analyzed the legislative history of Section 1461 and stated ,

"My research into the legislative history of the `knowingly causes to be delivered' provision reveals that Congress did not intend for it to cover receivers."(emphasis supplied).***In 1953, the Tenth Circuit in United -tates v. -Ross,205 F.2d 619, interpreted the sender provision of Section 1461 as limiting prosecution of those who mailed obscene material to jurisdictions in which the mail was deposited. The court affirmed the dismissal of an indictment seeking to prosecute defendants***.The court explained: We think there is a clear distinction between a deposit for mailing or delivery and the use of the mails.....[T]he unlawful act defined in Section 1461 is the deposit for mailing

and not a use of the mails which may follow such deposit.The act is complete when the deposit is made and is not a continuing act.id at 621.As a direct response to the Ross opinion Congress amended Section 1461's sender provision for the explicit purpose of making the offense of `deposits for mailing' a continuing offense.***As explained below, the sender provision amendment was never intended to apply to receivers of obscene material.On the contrary,Congress viewed receivers-children and `adults of low mentality'-as the victims of solicited and unsolicited obscene materials.104 Cong.Rec.8994."

It seems abundantly clear that congress by the use of the words `causes to be delivered'in the statute which theretofore was solely a sender statute, intended that such words would give the appropriate venue in the prosecution of senders and had nothing to do with extending the statute to receivers.At page 309

"***the only purpose for the amendment was to expand the venue of the former sender provision. There is no indication whatsoever in any of the

reports that receivers would in the sender provision amendment.The Senate Report states that the purpose of the proposed amendment is to:

`make it possible to prosecute violators of Section 1461 of title 18 of the United States Code ( mailing of obscene or crime-inciting material)not only at the place at which the objectionable matter is mailed, but also at the place of address or delivery.' S.Rep ***.`Violators'are those who mail obscene material.***The report clearly indicates that the Senate viewed the senders as the evildoers,and the receivers as the victims:The main evil to be combatted is the harm done to those who are exposed to obscene material at the point of receipt.'***`This bill will amend section 1461 ....so as to make the deposit of obcene matter in the mails a use of the mails...The importance of this decision [Ross] rests in the fact that it is sometimes difficult to obtain a conviction for the mailing of obscene matter in certain jurisdictions.'***The purpose of the bill ... is that persons mailing obscene literature...'****.

B. THE SAME AMBIGUITY DEMONSTRATED IN POINT A ABOVE CLEARLY DEMONSTRATES THE INVALIDITY OF THIS STATUTE WHEN APPLIED TO THIS PETITIONER BASED UPON ITS VAGUENESS.

If a judge on the Court of Appeals and a District Court judge do not believe

that petitioner is included by his conduct as a criminal(receiver) then it seems abundantly clear that the ordinary person cannot be expected to understand that his conduct is prohibited. The only receivers covered by the statute are those who are going to circulate same. It would seem that the vagueness is demonstrated by the opinions of Judge Merritt and the decision in the Sidelko case.

C. THE COURT OF APPEALS IN ITS OPINION DECIDING THAT THE 9 MONTH DELAY FROM THE INTERCEPTION OF THE MATERIAL BY CUSTOMS UNTIL IT IS DELIVERED BY CUSTOMS TO ITS POINT OF DESTINATION IS CONTRARY TO THE LAWS OF THE STATES REGARDING ATTEMPTS, INTERVENING ACTS AND CAUSATION. AND MISAPPLIES THE PEREIRA CASEOF THIS COURT.

The cases seem clear that the conduct proven by the government at best constituted an attempt and not a compled offense contrary to the laws of the

Supreme Court of Missouri. State v Block, 62 SW 2d 428 (MO Supp 1933).

Both parties in this case, and the court of appeals acknowledged that there was no precedent covering this particular issue.

In the case of Collins v. Radford, 113 SE 735 (Sup Ct of App Va 1922) defendant was convicted of attempt when his stash of whisky was discovered by a 3rd person who alerted police and the 3rd person and police were waiting for him when he returned and arrested him when he reached into the haystack to get his whiskey which had been removed by the police prior to defendant's return.

In the present case the customs people foiled the attempt and by holding it for 9 months became an intervening cause which delivered the material , not

in the mail, directly to its destination, and certainly not in the ordinary couse of business as indicated in Pereiras.

D. PETITIONER IS IMPRISONED FOR A CRIME WHICH LEARNED JUDGES SAY DOES NOT APPLY TO HIM.

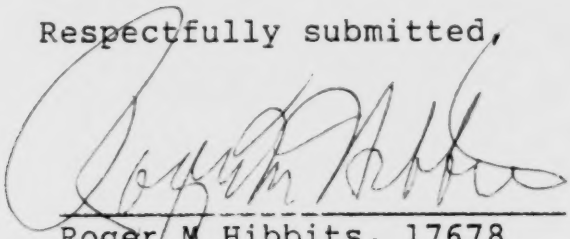
It is suggested that this position is supported by the dissent in the Johnson case and the Sidelko.

One further feature of these discisions is that Congress was aware of the Sidelko decision which held that recipients in general are not included as criminals, when it made its most recent amendment and did not seek to amend the statute to change the effect of the Sidelko decision as it did in the Ross Case.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that 3 copies of the foregoing petition was mailed this 23rd day of July,1990, to counsel for Respondent, i.e. ,United States Attorney

ror the Eastern District of Missouri, Federal Building, Tucker & Market, St Louis, Missouri , 63101.

Roger M Hibbits
Attorney for Petitioner

EXHIBIT A

UNITED STATES OF AMERICA,

APPELLEE

VS

ALFRED R. KUENNEN

APPELLANT

NO. 89-1229

UNITED STATES COURT OF APPEALS

EIGHTH CIRCUIT

Filed: April 9, 1990

Alfred R. Kuennen was convicted of violating 18 U.S.C. Section 1461(1988) , by causing obscene material to be sent to himself through the United States mail. On appeal, he makes thirteen arguments in support of reversal. In sum, he contends that: (1) United States Customs officials broke the necessary causal chain and defeated venue in the Eastern District of Missouri when they intercepted the

obscene material in Chicago,Illinois; (2) as applied to him,18 U.S.C. Section 1461 violates both the establishment clause of the First Amendment to the United States Constitution and his constitutional right to privacy; (3) the district court erroneously admitted prejudicial evidence; and (4) the district court instructed the jury incorrectly. We affirm the judgment of the district court./1

1/ The Honorable William L. Hungate, United States District Judge for the Eastern District of Missouri.

-1-

Kuennen ordered a magazine, containing pictures of sexual activities between young boys, from the Scandinavian Direct Mail Company in Denmark. A United States Customs Service employee in

Chicago recognized the name of the company on the envelope and suspected that the package contained obscene materials. After opening the package upon its seizure in June of 1984, the Customs employee sent the material by registered mail to the United States Customs office in St. Louis, Missouri. (Tr. I 27-29,67,134-35). A customs Agent in St. Louis made arrangements with the postal department for the package to be delivered to Kuennen's post office box, and the Agent waited on several occasions for Kuennen to pick up his mail. The Agent was present when Kuennen finally took the package from the post office box on March 20,1985. After Kuennen picked up the envelope, the Agent identified himself and read Kuennen a warning based upon Miranda v. Arizona ,384 U.S.

436(1966). Kuennen then handed the package to the Agent, admitted that he had ordered it, and consented to a search of his residence in Franklin County, Missouri. In Kuennen's residence, Customs Agents discovered several pornographic items as well as order forms for pornographic material. After being reminded of his Miranda rights ,Kuennen acknowledged ordering the pornographic material that the Agents had discovered.

I.

Kuennen makes a number of arguments concerning the seizure of the package and its delayed delivery. Kuennen notes that he was convicted of knowingly causing obscene items to be delivered by mail on or about March 20,1985. He argues that both the seizure of the package by Customs officials in Chicago in June 1984

and the lengthy delay before the items was delivered broke any chain of causation, produced an impermissible variance between the charge and proof, and defeated venue in the Eastern District of Missouri.

The parties agree that the package was intercepted by Customs officials before it entered the United States mail. Later a Customs Agent in another state placed the package into the United States mail. Kuennen's strongest argument is that the Customs SErvice, not he, caused the material to be delivered through the mail.\2 Neither party has cited any cases discussing this question. The Supreme Court, however, has held in a related context that when "one does an act with knowledge that the use of the mails will follow in the ordinary course of

business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used." Pereira v. United States, 347 U.S. 1,8-9(1954). The record indicates that Kuennen admitted ordering the article and that it was addressed to his post office box. Given those facts,it was clear that, if the package had not been intercepted , the use of the mails would have followed "in the ordinary course of business" and that such use could reasonably have been foreseen. Therefore, we hold that he did cause the mails to be used to deliver the package. Moreover, we believe that the delay between the interception of the package and its delivery is not relevant to the question of causation. We also note that similar deliveries have supported

convictions in United States v. Garot, 801 F.2d 1241 (10th Cir. 1986), and United States v. Hurt,795 F.2d 765 (9th Cir. 1986), both of which involved material that the United States Customs offices seized in one state and forwarded to the ultimate state of delivery; but in neither case was the method of delivery challenged. Our resolution of this question disposes of Kuennen's argument that there was an impermissible variance between the charge and proof.

2/The Sixth and Ninth Circuits have held that section 1461 applies to recipients, as well as to senders, of obscene material. SeeUnited States v. Johnson,855 F.2d 299,305-07 (6th Cir. 1988);United States v. Hurt,795 F.2d 765, 769-70 (9th Cir. 1986), modified in part not relevant here,808 F.2d 707 (9th Cir.), cert.denied, 484 U.S. 816 (1987). But see Johnson,855 F.2d at 307-11 (Merritt,J.,dissenting); United States v. Sidelko, 248 F.Supp. 813,815(M.D. Pa 1965).

Kuennen's venue argument is frivolous, because 18 U.S.C. Section 3237 (1988) provides that "[a]ny offense involving the use of the mails ... is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such mail matter ... moves." See United States v. Thomas, 613 F.2d 787, 792 (10th Cir.), cert. denied, 449 U.S. 888 (1980). Kuennen's argument that the delay caused the statute of limitations is also frivolous. See 18 U.S.C. Section 3282 (1988) (providing a five-year limitation on non-capital criminal actions).

II.

Kuennen also argues that section 1461, as applied to his conduct, violates

both the establishment clause of the First Amendment and his right to privacy. His establishment clause argument consists of only a bald assertion that the establishment has been violated. On the record before us, that contention is patently untenable. The privacy argument can also be dealt with summarily. The Supreme Court has repeatedly held that there exists no constitutional right to transmit obscene material. See Sable Communications v. FCC, 109 S.Ct. 2829,2835(1989); United States v. Orito, 413 U.S. 139,140-43(1973); United States v. 12 200-Ft. Reels of Super 8mm. Film, 413 U.S. 123,126-30 (1973); Paris Adult Theatre I v. Slaton,413 U.S. 49, 57-70(1973);United States v. Thirty-Seven Photographs,402 U.S. 363,375-77 (1971); United States v. Reidel,402 U.S.

351,354-56(1971). Although many of these cases considered claims based upon Stanley v. Georgia,394 U.S. 557(1969), and Kuennen relies upon Roe v. Wasde,410 U.S. 113 (1973), we believe that the Court has indicated its unwillingness to interpret Roe and Griswold v. Connencticut, 381 U.S. 479 (1965), as granting a right to transfer obscene material. See Orito, 413 U.S. at 140-43; Paris Adult Theatre, 413 U.S. at 65-66.

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III.

At trial, Kuennen objected to the introduction of mail order forms and advertixements for pornography,receipts for registered mail,and pornographic items found during the search of his residence. His objection that the items

were irrelevant because they were not received until 1985 is rejected based on our earlier discussion. Those items were admissible to prove scienter, Garot, 801 F.2d at 1247 , but Kuennen contends that their "probative value is substantially outweighed by the danger of unfair prejudice," Fed. R.Evid. 403. We review this question of admissibility only for abuse of discretion, Jones v. Board of Police Comm'rs, 844 F.2d 500, 505(8th Cir. 1988), cert. denied, 109 S.Ct.2434(1989), and we are satisfied that the district court, which excluded a number of items, acted well within its discretion.

IV.

Finally, Kuennen claims that the district court should have added a "tail" to Instruction 11/3 directing the jury to

refer back

3/ Instruction No. 11 reads as follows:

In order to prove a violation of this section, the government must prove the following elements beyond a reasonable doubt:

First, that the defendant knowingly and willfully used or caused the use of the mails for the conveyance or delivery of certain articles as charged;

Second, that the defendant knew at the time of such mailing the general nature of the content of the matter so mailed;

Third, that the matter so mailed was obscene as hereafter defined.

(Appellant's Addendum at 17).

to Instruction 9-1./4 Keeping in mind the wide discretion district courts possess when formulating jury instructions, United States v. Walker,817 F.2d 461,463 (8th Cir.),cert. denied,484 U.S. 863 (1987),and the fact that we must consider the instructions as a whole,United States v. Casperson,773 F.2d

216,223 (8th Cir.1985), we conclude that the district court acted well within its discretionary powers.

V.

Kuennen asserts numerous other claims of error and all are without merit. We affirm the judgment of the district court.

4/ Instruction No. 9-1 provides:

> I am sending a copy of the indictment in with you. An indictment is but a formal method of accusing a defendant of a crime. It is not evidence of any kind against the accused. You will note the indictment charges that the offense was committed "on or about" certain dates. The proof need establish with certainty the exact dates of the alleged offense. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offense was committed on dates reasonably near the dates alleged.

(Appellant's Addendum at 16).

EXHIBIT B

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 89-1229EM

United States of America,	*	
	*	
Appellee,	*	
	*	Order denying
v.	*	Petition For
	*	Rehearing and
Alfred R. Kuennen,	*	Suggestion
	*	For Reheaing
Appellant.	*	En Banc.

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

May 25,1990

EXHIBIT C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
PLAINTIFF,	)	
	)	
V.	)	NO.88-0171-CR3
	)	
ALFRED RICHARD KUENNEN,	)	
	)	
DEFENDANT	)	

COUNT I

The Grand Jury charges that:

On or about March 20,1985, in the Eastern District of Missouri, ALFRED RICHARD KUENNEN, the defendant herein, did knowingly cause to be delivered by mail to "Mr. A.R.Kuennen, Box #12504, St.Louis, Missouri 63141 U.S.A.", the place at which it was directed to be delivered by the defendant, to whom it was addressed, an obscene, lewd, and

lascivious article, namely, "Superboy,Nr. 32", said article not being further described in this indictment as the same would defile the records of this Court.

In violation of Title 18,United States Code, Section 1461.

No. 90-[illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1990

ALFRED R. KUENNEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
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ROBERT S. MUELLER, III
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QUESTIONS PRESENTED

1. Whether petitioner violated 18 U.S.C. 1461, which prohibits causing obscene matter to be delivered by mail, when he ordered an obscene magazine from a supplier in Denmark and the magazine was subsequently delivered to his post office box.

2. Whether the fact that the obscene magazine was placed in petitioner's post office box by means of a controlled delivery after it had been intercepted by the Customs Service foreclosed petitioner's prosecution under 18 U.S.C. 1461.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-176

ALFRED R. KUENNEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 28-40) is reported at 901 F.2d 103.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1990. A petition for rehearing was denied on May 25, 1990 (Pet. App. 41). The petition for a writ of certiorari was filed on July 23, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on one count of causing obscene matter to be delivered to him by mail, in violation of 18 U.S.C. 1461. He was sentenced to 3½ years' imprisonment. The court of appeals affirmed.

1. The evidence at trial showed that petitioner ordered a magazine, containing pictures of sexual activities between young boys, from a company in Denmark. In June 1984, the magazine, which was contained in an envelope addresed to petitioner, arrived in Chicago. Before the package was placed in the United States mail, it was examined by a Customs Service employee. The employee recognized the sending company's name on the envelope and suspected that the package contained obscene materials. The Customs Service opened the package, inspected its contents, and seized it. Pet. App. 29-30, 32.

After an investigation, the Customs Service arranged with the Postal Service to make a controlled delivery of the package to petitioner's post office box in St. Louis. On March 20, 1985, petitioner removed the package from his box. When a Customs agent confronted petitioner and advised him of his rights, petitioner handed the magazine to the agent and admitted that he had ordered it. A search of petitioner's residence disclosed additional pornographic material, which petitioner admitted ordering. Pet. App. 30-31.

Petitioner was convicted of violating 18 U.S.C. 1461 by causing the magazine to be delivered by mail. That statute provides that obscene articles are "nonmailable matter" and imposes criminal penalties on a person who

> knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section * * * to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof * * *.

2. The court of appeals affirmed. Pet. App. 28-40. The court rejected petitioner's contention that the prosecution was foreclosed by the fact that federal authorities had made a controlled delivery of the magazine nine months after it had been seized. The court noted that in *Pereira* v. *United States*, 347 U.S. 1, 8-9 (1954), this Court stated that when "one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used." Here, the court of appeals explained, "it was clear that, if the package had not been intercepted, the use of the mails would have followed 'in the ordinary course of business' and that such use could reasonably have been foreseen." Pet. App. 33. Thus, the court concluded, petitioner "did cause the mails to be used to deliver the package"; the court added that the delay between the package's interception and delivery was not relevant. *Ibid.*[1]

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[1] The court also rejected a number of other contentions. Pet. App. 35-40. The petition does not seek further review of those issues.

ARGUMENT

1. Petitioner contends that the "causes to be delivered by mail" clause of Section 1461 applies only to those who participate in sending obscene material by mail and does not extend to individuals who receive such material by mail after ordering it. Pet. 18-23.

The court of appeals' decision in this case is consistent with the only other appellate decision to construe the "causes to be delivered by mail" clause of Section 1461. *United States* v. *Johnson*, 855 F.2d 299, 305-306 (6th Cir. 1988). It is also consistent with a decision from the Ninth Circuit holding that a person who orders obscene material for delivery violates Section 1461 by "us[ing] the mails" for the delivery of that material. *United States* v. *Hurt*, 795 F.2d 765, 769-770 (9th Cir. 1986), cert. denied, 484 U.S. 816 (1987).[2] No court of appeals has held that those clauses of Section 1461 are inapplicable to persons who receive obscene material. The only case supporting petitioner's position is a 25-year-old district court decision. *United States* v. *Sidelko*, 248 F. Supp. 813 (M.D. Pa. 1965).

The prevailing interpretation of Section 1461 is well-founded. The statute prohibits "knowingly caus[ing]" obscene material "to be delivered by mail according to the direction thereon." As the Sixth Circuit explained in *Johnson*, that language is "clearly broad enough to encompass persons who order and receive obscene material for personal use and consumption and is not limited to persons who only place obscene material in the mail." 855 F.2d at 306.

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[2] See also *United States* v. *Dornhofer*, 859 F.2d 1195, 1198 n.1 (4th Cir. 1988) (citing *Hurt* with approval), cert. denied, 109 S. Ct. 1639 (1989).

An individual who, like petitioner, orders obscene material for delivery by mail knows that the material will be delivered by mail to the address he has provided and causes the material to be delivered in that manner.

In arguing that the "causes to be delivered by mail" clause does not apply to recipients of obscene material, petitioner relies primarily upon the dissenting opinion in the Sixth Circuit's decision in *United States* v. *Johnson*, *supra*. Pet. 19-22. Judge Merritt concluded in his dissent in *Johnson* that the "causes to be delivered by mail" clause should be limited to those who participate in sending obscene materials and should not be applied to recipients, even if the recipients order the materials for delivery by mail. 855 F.2d at 307-312.

Judge Merritt relied on two aspects of Section 1461's text. First, he maintained that, because the last clause of Section 1461 prohibits knowingly taking obscene material from the mails "for the purpose of circulating or disposing thereof," the "causes to be delivered by mail" clause cannot be applied to recipients of obscene material who do not intend to distribute it further. The "takes from the mails" clause, however, does not purport to limit the preceding clauses in the statute; the language of Section 1461 does not suggest that a recipient of obscene material who is not subject to prosecution under the "takes from the mails clause" is thereby rendered immune from prosecution under a different clause.

Second, Judge Merritt found support for his position in the fact that the "causes to be delivered by mail" clause prohibits deliveries of nonmailable matter "according to the direction thereon." That phrase, however, merely describes one of two types of deliveries that can violate the "causes to be de-

livered by mail" clause. A violation of that clause occurs either when a delivery by mail is "according to the direction thereon" or when the delivery is "at the place at which it is directed to be delivered by the person to whom it is addressed." Either type of delivery may be "caused" by a sender of obscene material or an addressee who orders material for delivery by mail. The fact that Section 1461 enumerates types or locations of delivery does not impose any limit on the class of persons who may be held to violate it.

Because there is no ambiguity in the statute, there is no need to resort to legislative history to determine its scope. See *Garcia* v. *United States*, 469 U.S. 70, 75 (1984). In any event, however, the legislative history of the "causes to be delivered by mail" clause does not speak to the point at issue here. Before 1958, Section 1461 had two clauses, which applied, respectively, to anyone who "deposit[ed]" nonmailable matter "for mailing or delivery" and anyone who "[took] the same from the mails for the purpose of circulating or disposing thereof." 18 U.S.C. 1461 (1952). In *United States* v. *Ross*, 205 F.2d 619 (1953), the Tenth Circuit held that the first clause was violated only at the location where the nonmailable matter was actually deposited in the mails—thus limiting venue in such a prosecution to that district. To extend venue, Congress amended Section 1461 to prohibit "us[ing] the mails" to transmit nonmailable matter or "caus[ing]" nonmailable matter "to be delivered by mail" either at the place to which it is addressed or the point of actual delivery. The effect was to allow prosecutions not only in the district in which the obscene material was deposited in the mail, but also in districts through which the material travelled (see 18 U.S.C.

3231) and in which it was delivered. See H.R. Rep. No. 1614, 85th Cong., 2d Sess. (1958); S. Rep. No. 1839, 85th Cong., 2d Sess. (1958); H.R. Conf. Rep. No. 2624, 85th Cong., 2d Sess. (1958). While the legislative history of the 1958 Act indicates that recipients of obscene materials were among those the statute was designed to protect, the history does not manifest an intention to immunize persons who knowingly induce the use of the mails to transmit such materials. Nothing in the legislative history warrants a departure from the plain meaning of the statute.

Finally, Judge Merritt's interpretation rests on a false premise—the proposition that the pre-1958 version of Section 1461 could not be applied to persons who ordered obscene materials for their own use. Relying on legislative history suggesting that the addition of the "causes to be delivered by mail" clause was not viewed as an extension of the statute, he reasoned that the post-1958 version of Section 1461 carries forward the same limitation. Even if Congress had not enacted the "causes to be delivered by mail" clause in 1958, however, a person in petitioner's position would still have been subject to prosecution for aiding and abetting the mailing of obscene materials. The federal aiding and abetting statute, 18 U.S.C. 2(a), reaches everyone who "induces or procures" the commission of a crime; a person who orders an obscene magazine, knowing it to be obscene and knowing that it will be sent through the mails, clearly "induces or procures" the sender to deposit the material in the mail. The fact that the legislative history of the 1958 amendment does not indicate an intention to expand the class of persons subject to prosecution under Section 1461 does not undercut the validity of the prosecuton in this case,

because persons in petitioner's position were already subject to prosecution under the statute as aiders and abettors.

2. Relying on the fact that the obscene magazine he ordered from Denmark was placed in his post office box by means of a controlled delivery, petitioner argues that he was guilty at most of an attempt to violate Section 1461 and that the actions of federal authorities, rather than his own, caused the magazine to be delivered by mail. Pet. 23-25.

There is no merit to that contention. When petitioner ordered the magazine, he had "knowledge that the use of the mails [would] follow in the ordinary course of business," *Pereira* v. *United States*, 347 U.S. 1, 9 (1954). The fact that federal authorities became aware of the unlawful nature of the shipment and arranged for a controlled delivery does not give rise to any defense. See *United States* v. *Dornhofer*, 859 F.2d 1195, 1197-1198 & n.1 (4th Cir. 1988), cert. denied, 109 S. Ct. 1639 (1989); *United States* v. *Goodwin*, 854 F.2d 33, 36-37 & n.3 (4th Cir. 1988).[3] By ordering the obscene material, petitioner set in motion a transaction that would necessarily involve the use of the mails; federal authorities sim-

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[3] Both *Dornhofer* and *Goodwin* arose out of a government sting operation in which federal authorities solicited orders for child pornography and apprehended customers after making controlled deliveries to them. The Fourth Circuit upheld convictions under 18 U.S.C. 2252, rejecting contentions that the government had manufactured federal jurisdiction and that the controlled deliveries did not constitute a "mailing" within the meaning of Section 2252. In this case, federal authorities played a lesser role in causing the unlawful use of the mails. Instead of initiating the mailings, they merely delivered the package petitioner had ordered to the box to which it was addressed.

ply arranged for that transaction to proceed to its natural conclusion. This was not a case, in short, in which federal agents manufactured a crime or created a basis for federal jurisdiction. See *Hampton* v. *United States*, 425 U.S. 484 (1976); *United States* v. *Brantley*, 777 F.2d 159, 163 (4th Cir. 1985), cert. denied, 479 U.S. 822 (1986); *United States* v. *Archer*, 486 F.2d 670 (2d Cir. 1973).

Nor is there any merit to petitioner's suggestion that the nine-month delay between the interception of the magazine and its delivery to his post office box broke the chain of causation. As the court of appeals held, the existence of a delay between the interception of the shipment and the controlled delivery "is not relevant to the question of causation." Pet. App. 33. The passage of time did not render petitioner any less responsible for the shipment's delivery by mail.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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